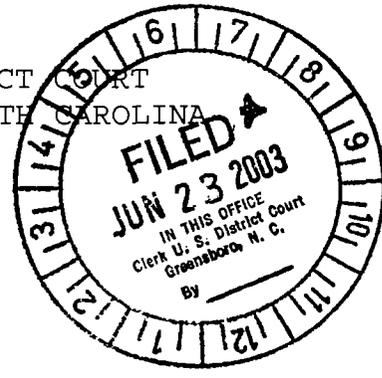


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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



DAVANIA ADDISON,)
)
Plaintiff,)
)
v.)
)
WAL-MART STORES, INC.,)
)
Defendant.)

CIVIL NO. 1:02CV00333

MEMORANDUM OPINION

BULLOCK, District Judge

Davania Addison ("Plaintiff") filed suit against Wal-Mart Stores, Inc. ("Defendant") in the Superior Court of Cabarrus County, North Carolina, alleging claims of race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), 42 U.S.C. § 1981 ("Section 1981"), and North Carolina's Equal Employment Practices Act, N.C. Gen. Stat. § 143-422.1 et seq. On April 29, 2002, Defendant removed the case to this court. This matter is before the court on a motion for summary judgment by Defendant pursuant to Federal Rule of Civil Procedure 56. For

the following reasons, the court will grant Defendant's motion for summary judgment.

FACTS

Plaintiff began working at Defendant's store in Kannapolis, North Carolina, on August 27, 1999. Her responsibilities included assisting the store's personnel manager in performing the general human resources functions. Shortly after Plaintiff was hired, the personnel manager left her employment for health-related reasons. Plaintiff assumed most of the responsibilities and duties previously performed by the personnel manager. Plaintiff was responsible for, *inter alia*, training new employees about Defendant's corporate policies prohibiting discrimination and sexual harassment in the workplace.

For most of her employment, Plaintiff's direct supervisor was the store manager, James Dick. Plaintiff stated that she believed Dick's tenure as store manager was too lengthy and that he had developed overly friendly relationships with several employees. This familiarity, she believed, caused Dick to exercise poor leadership and prevented him from disciplining employees and enforcing Defendant's policies.

In the spring of 2000, Dick's immediate supervisor was replaced by Anthony Nardozzi. After assuming responsibility over the Kannapolis store, Nardozzi began to ask questions about Dick's leadership and store operations in general. Plaintiff assisted Nardozzi by providing him with information concerning her complaints about Dick's policy violations. She claimed that Dick violated check-cashing procedures, permitted certain employees to consistently write bad checks, showed favoritism toward certain employees, violated supply-ordering procedures, wrongfully permitted employees to buy prized or intentionally damaged goods that were intended for customers, and permitted illegal aliens to work in the store. According to Plaintiff, she was Nardozzi's confidant and was integral to the efforts that ultimately led to Dick being demoted and transferred.

A few weeks following Dick's demotion and transfer, Nardozzi received complaints from non-supervisory employees about Plaintiff. Nardozzi eventually learned that six employees alleged inappropriate conduct on Plaintiff's part. Nardozzi requested that the employees provide him with written statements summarizing their allegations about Plaintiff's conduct. He then met with each employee to discuss the contents of his/her complaint. The employees complained that Plaintiff repeatedly

touched them inappropriately, made sexually charged comments, and engaged in other unwelcome behavior.

As part of Nardozzi's investigation, he spoke with Plaintiff about the allegations made by the employees. Plaintiff denied having done anything inappropriate. Nardozzi, however, concluded that given the number of statements from various witnesses and the detail of their oral accounts, Plaintiff had violated Defendant's sexual harassment policy. After conferring with his supervisors, Nardozzi terminated Plaintiff's employment on or about September 22, 2000.

Following her termination, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Plaintiff alleged in the charge that she was replaced by a white female, management failed to conduct any type of internal investigation into her alleged misconduct, internal investigations were conducted when white management-level employees were accused of misconduct, and, approximately three weeks prior to her discharge, the store manager, who was white, was disciplined, demoted, and transferred based on information she provided to the corporate office. (Def.'s Mot. Summ. J., Ex. L.) On September 26, 2001, the EEOC issued Plaintiff a right-to-sue letter.

DISCUSSION

I. Standard of Review

Summary judgment must be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of persuasion on the relevant issues. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party may survive a motion for summary judgment by producing "evidence from which a [fact finder] might return a verdict in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). When the motion is supported by affidavits, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(e); see also Cray Communications, Inc. v. Novatel Computer Sys., Inc., 33 F.3d 390, 393-94 (4th Cir. 1994) (moving party on summary judgment motion can simply argue the absence of evidence by which the non-movant can prove her case). In considering the evidence, all reasonable inferences are to be drawn in favor of the non-moving party. Anderson, 477 U.S. at 255. However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence

on which the [fact finder] could reasonably find for the plaintiff." *Id.* at 252.

II. Title VII and Section 1981

A plaintiff may prove a claim of employment discrimination by direct evidence or by circumstantial evidence under a method of proof established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Because Plaintiff lacks direct evidence of racial discrimination, she must satisfy the burden-shifting analysis established in McDonnell Douglas. Under the McDonnell Douglas scheme, once a plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). If the employer satisfies its burden of production, the presumption of discrimination raised by the prima facie case is rebutted and "drops from the case," *id.* at 255 n.10, and the plaintiff bears the ultimate burden of proving she has been the victim of discrimination. In attempting to satisfy this burden, the plaintiff must be afforded the "opportunity to prove . . . that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Burdine, 450 U.S. at 253.

A. Discriminatory discharge

Plaintiff's Title VII and Section 1981 claims allege that she was discriminated against because of her race. To establish a prima facie case of racial discrimination under McDonnell Douglas, Plaintiff must show that: (1) she is a member of a protected class; (2) she suffered some adverse employment action; (3) at the time of the employment action, she was performing at a level that met her employer's legitimate expectations; and (4) the adverse employment action occurred under circumstances that raised an inference of unlawful discrimination. McKiver v. General Elec. Co., 11 F. Supp. 2d 755, 759 (M.D.N.C. 1997) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993)); see also Halperin v. Abacus Tech. Corp., 128 F.3d 191, 201 (4th Cir. 1997).

Plaintiff cannot carry her burden of establishing a prima facie case. Plaintiff has proffered no evidence demonstrating that her termination occurred under circumstances that raise an inference of unlawful discrimination. In fact, Plaintiff's own deposition testimony undercuts any claim of discrimination she may allege. Plaintiff's theory of her discrimination claim is that her non-supervisory co-workers fabricated sexual harassment allegations in retaliation for her involvement in Dick's demotion and transfer. She stated that her co-workers who alleged the

sexual harassment "never had a problem with [her] until [Dick] was transferred. That's when all of a sudden, for lack of a better word, dung hit the ceiling." (Pl.'s Resp. Def.'s Mot. Summ. J., Pl.'s Dep. at 96.) Plaintiff's race is completely immaterial under her theory of her case.

Moreover, Plaintiff testified that Nardozzi, who made the decision to discharge her, held no personal animosity toward her. Plaintiff provided no evidence of racial animus by Nardozzi, nor does she even attempt to argue that Nardozzi held such an animus. Nardozzi's decision to discharge Plaintiff was based on his investigation of the sexual harassment charges made by several employees and was in complete accord with Defendant's corporate policy against sexual harassment. Plaintiff's failure to impugn the motives of Nardozzi is itself fatal to her claim of discrimination. Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 960-61 (4th Cir. 1996). Simply put, there is no evidence that suggests Plaintiff was discriminated against because of her race.

B. Retaliation

Plaintiff also alleges a claim of retaliation. In order to establish a prima facie retaliation claim, Plaintiff must show: (1) participation in a protected activity; (2) subjection

to an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action. Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 271 (4th Cir. 2001). Plaintiff apparently contends that the protected activities she engaged in were her reporting of Dick's violation of store operating procedures and policies and her complaint to Dick that a promotion should have been awarded to an African-American already employed by Defendant rather than to a Caucasian.

Plaintiff's participation in providing information about Dick's job performance to Nardozzi does not constitute protected activity. She reported that Dick violated check-cashing procedures, permitted certain employees to consistently write bad checks, showed favoritism toward certain employees, violated supply-ordering procedures, and wrongfully permitted employees to buy prized or intentionally damaged goods that were intended for customers. Plaintiff's reports about Dick's conduct did not involve allegations of unlawful discrimination but rather involved allegations that Dick was violating store operating policy.

The only activity Plaintiff engaged in that is arguably protected activity was her complaint to Dick about the promotion of a Caucasian instead of an African-American. However, there is

no causal connection between her complaint about the promotion and her termination. The decision to terminate Plaintiff was not made by Dick, to whom and of whom she complained. Nardozzi made the decision to discharge Plaintiff, and there is no evidence that he was aware of her earlier complaint to Dick about the promotion matter. Because Nardozzi was unaware of Plaintiff's complaint regarding the promotion, he cannot have retaliated against Plaintiff for this activity.

C. Failure to promote

In addition to her claims of discriminatory termination and retaliation, Plaintiff's complaint alleges she was denied a promotion because of her race. Like her other claims of unlawful discrimination, Plaintiff's failure-to-promote claim also fails. First, Plaintiff has provided absolutely no evidence to support her promotion claim. The only indication of such a claim is the allegation in her complaint. Plaintiff's deposition, which is the only evidence proffered, is devoid of any reference to her allegation that she was denied a promotion.

Second, the March 1, 2001, charge filed with the EEOC contains no allegations that would support a failure-to-promote claim. The factual allegations contained in a charge of discrimination filed with the EEOC define the scope of any

subsequent civil suit. Evans, 80 F.3d at 962-63. The only allegations contained in Plaintiff's charge relate to her claims of discriminatory termination and retaliatory discharge. Nor is Plaintiff's failure-to-promote claim reasonably related to the circumstances giving rise to her termination. Accordingly, she may not present a claim of discrimination she failed to allege in her EEOC charge of discrimination.

Finally, even giving Plaintiff every factual benefit of the doubt, her failure-to-promote claim is nevertheless time barred. To be timely under Title VII, a charge of discrimination must be filed with the EEOC within 180 days of the alleged misconduct. 42 U.S.C. § 2000e-5(e) (1995); McCullough v. Branch Banking & Trust Co., 35 F.3d 127, 131 (4th Cir. 1994) (claim is time-barred in federal court if employee does not file a timely charge with the EEOC). Plaintiff's only charge of discrimination filed with the EEOC was submitted on March 1, 2001. This charge, therefore, would make timely any claim of discrimination that occurred after September 1, 2000. Plaintiff alleges that she performed the duties of personnel manager but was not given the promotion. She further alleges that the store manager, Dick, told her that "'the area' was not ready for a black personnel manager." (Notice of Removal, Compl. ¶ 6.) Dick, however, was demoted and transferred at a minimum two months prior to her termination, which occurred

on September 22, 2001. Accordingly, any alleged discrimination relating to Plaintiff's request for a promotion occurred outside of the time period covered by her March 1, 2001, EEOC charge and is therefore barred.

III. North Carolina Equal Employment Practices Act

The North Carolina Equal Employment Practices Act ("NCEEPA") provides that "[i]t is the public policy of [North Carolina] to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination . . . on account of race." N.C. Gen. Stat. § 143-422.2 (2001). However, "[n]either the North Carolina Supreme Court nor the North Carolina Court of Appeals has recognized a private cause of action under the NCEEPA." Smith v. First Union Nat'l Bank, 202 F.3d 234, 247 (4th Cir. 2000); see also Chung v. BNR, Inc., 16 F. Supp. 2d 632 (E.D.N.C. 1997) (holding that employee had no cause of action under the NCEEPA for wrongful discharge based on allegations of retaliation, failure to promote, or harassment). Thus, because the NCEEPA does not provide a private right of action, Plaintiff cannot maintain a claim under it.

Furthermore, to the extent that Plaintiff could maintain her claim as a common law discharge claim, such a claim would nevertheless fail for the same reasons that Plaintiff's Title VII

and Section 1981 claims fail. See Hughes v. Bedsole, 48 F.3d 1376, 1383-84 (4th Cir. 1995) (analyzing the plaintiff's claim under common law).

CONCLUSION

For the reasons set forth in this opinion, the court will grant Defendants' motion for summary judgment.

An order and judgment in accordance with this memorandum opinion shall be entered contemporaneously herewith.

June 23, 2003


United States District Judge